A

TAN VAN CHIEU & ORS v. PP

COURT OF APPEAL, PUTRAJAYA
TENGKU MAIMUN TUAN MAT JCA
ABANG ISKANDAR JCA
AHMADI ASNAWI JCA
B [CRIMINAL APPEAL NO: Q-09-352-12-2015]
4 APRIL 2016

CRIMINAL LAW: *Fisheries Act 1985 – Section 16(3) – Conviction and sentence – Further order by Magistrate for forfeiture of proceeds from fishing paraphernalia*
C *including vessel – Validity of order – Whether offence admitted by accused persons – Challenge as to powers of Malaysian Maritime Enforcement Agency officers – Whether meritorious – Whether officer had powers to act under Fisheries Act 1985 – Malaysian Maritime Enforcement Agency Act 2004, ss. 2 & 7(3)*

D ***CRIMINAL PROCEDURE:*** *Forfeiture – Fisheries offence – Order for forfeiture of proceeds from fishing paraphernalia including vessel – Validity of order – Section 34 of Fisheries Act 1985 – Failure by Deputy Public Prosecutor to make application for forfeiture – Determining factor – Whether offence admitted by accused persons – Use of word 'disposed' and not 'forfeited' by Magistrate – Whether court satisfied that vessel was subject matter or used in commission of offence – Whether order*
E *occasioned in substantial miscarriage of justice – Fisheries Act 1985, s. 16(3)*

The appellants were charged in the Magistrate's Court for the offence under s. 16(3) of the Fisheries Act 1985 ('Fisheries Act') read with s. 34 of the Penal Code and punishable under s. 25(a) of the Fisheries Act. The charge was read and explained by a Vietnamese interpreter, after which, the
F appellants pleaded guilty to the charge, having understood the nature and consequences of the plea. The appellants were subsequently convicted by the Magistrate and were sentenced accordingly. The Magistrate further ordered that the proceeds from the auction of the diesel and fish be forfeited as the Government revenue and also the disposal of the exhibits including the
G vessel. Dissatisfied with the order for the forfeiture of the proceeds of the diesel and fish and the disposal of the exhibits, the appellants appealed to the High Court. The core issue before the High Court concerned the validity of the forfeiture and the disposal order of the Magistrate. The Judicial Commissioner ('JC') held that: (i) the order for forfeiture by the Magistrate
H was valid because the fishing paraphernalia including a trawl net was found on board of the vessel, as clearly stated in the facts of the case and admitted by all the appellants; (ii) no miscarriage of justice had arisen from the Magistrate's order; and (iii) the issue on the power of the Malaysian Maritime Enforcement Agency ('MMEA') to investigate and prosecute
I under the Fisheries Act was a backdoor attempt by the appellants to challenge the conviction under the disguise of revision. Hence, the appellants appealed against the JC's decision. The issues raised by the appellants were

(i) whether the learned Magistrate could order the forfeiture of the exhibits; and (ii) whether the MMEA officer had jurisdiction and powers to act under the Fisheries Act.

Held (dismissing appeal)
Per Tengku Maimun Tuan Mat JCA delivering the judgment of the court:

(1) The appellants, having pleaded guilty, could only appeal against the extent or legality of the sentence. Although the notice of appeal made no mention of the sentence as the appeal essentially was against the order of forfeiture and disposal of exhibits, in particular the vessel. It appeared that the legality of the sentence was also being challenged on the ground that the guilty plea was made under a mistaken view as the MMEA officers who investigated and prosecuted the appellants in fact had no power to act under the Fisheries Act. (para 26)

(2) The appellants' submission that the MMEA officers had no power to act under the Fisheries Act as they were neither included under s. 2 nor s. 36 and that none of the MMEA officers had tendered any document to the court to show that they had been appointed as such and that their appointments had been published in the *Gazette* was misconceived. The appellants had pleaded guilty in the Magistrate's Court. Given that there was no trial in respect of the charge against the appellants, the issue of not producing or tendering any document to prove the identification or appointment of the officers did not arise. (paras 32 & 33)

(3) While the Malaysian Maritime Enforcement Agency Act 2004 ('MMEA Act') provides for functions and powers of the MMEA to, *inter alia*, investigate any offence or arrest any person whom it has reason to believe had committed an offence, there is no provision in the MMEA Act itself in respect of the offences. 'Offence' has been defined in s. 2 of the MMEA Act as any offence under any federal law which is applicable in the Malaysian Maritime Zone. Section 7(3) of the MMEA Act provides that for the purpose of the MMEA Act, an officer of the MMEA shall have all the powers which any relevant agency may exercise under any federal law which is applicable in the Malaysian Maritime Zone. The relevant agency must necessarily include the Fisheries Department and the federal law, the Fisheries Act. Therefore, there was no doubt that the provisions of the MMEA Act allowed the MMEA officers to act under the Fisheries Act. The second issue was thus dismissed as it was devoid of any merit. (paras 35, 36 & 39)

(4) The relevant provision which the appellants had contravened or failed to comply was s. 16 of the Fisheries Act. There were fishing paraphernalia including a trawl net on board and the appellants had admitted that they were found to engage or attempt to engage in fishing activities in Malaysian waters. The finding was consistent with the notes of proceedings in the Magistrate's Court. The facts tendered by the

prosecution were read and explained to the appellants by the Vietnamese interpreter and each of the appellants admitted to the facts. The appellants also had admitted that the trawl nets were recovered from the vessel. Hence, there was no basis to contend that the JC erred in his findings. (paras 42, 44 & 45)

(5) Originally, the charge proffered against the appellants was under s. 15(1)(a) of the Fisheries Act. However, the charge was subsequently reduced to one under s. 16(3) of the Fisheries Act, to which the appellants had all pleaded guilty. Hence, there was no merit in the appellants' argument that they should have been charged under s. 15(1)(a). (paras 47, 49 & 50)

(6) The order for the forfeiture of the proceeds of sale of the diesel and fish and the order for the disposal of the vessel were valid under s. 34 of the Fisheries Act. Although the Magistrate had used the word 'disposed' and not 'forfeited' in respect of the exhibits, for all intents and purposes, the effect was the same, namely that the exhibits were forfeited to be disposed of by the prosecution. No substantial injustice had been occasioned by the order of the Magistrate. (para 52)

(7) Further, an order for forfeiture or disposal may be made by the court under s. 34 notwithstanding that the Deputy Public Prosecutor had not made any application for the forfeiture or disposal of the vessel. The determining factor was whether the court is satisfied that the vessel was either the subject matter or was used in the commission of an offence. There was no doubt that, although the charge was not under the provisions stated in s. 52, the fishing vessel was used in the commission of the offence, *to wit*, entering Malaysian waters without informing the Malaysian authorities in contravention of s. 16(3) of the Fisheries Act. The court therefore had the power to order the forfeiture of the vessel. Hence, there was no error on the part of the JC in affirming the order made by the Magistrate in respect of the said vessel. The proceeds of the sale of diesel and fish and the fishing vessel were ordered to be forfeited to the Government of Malaysia and be disposed of according to law. (paras 55, 57 & 58)

Bahasa Malaysia *Headnotes*

Perayu-perayu dipertuduh di Mahkamah Majistret bagi kesalahan di bawah s. 16(3) Akta Perikanan 1985 ('Akta') dibaca bersama-sama dengan s. 34 Kanun Keseksaan dan boleh dihukum di bawah s. 25(a) Akta. Pertuduhan tersebut dibacakan dan diperjelaskan oleh jurubahasa Vietnam, dan selepas itu perayu-perayu mengaku bersalah terhadap pertuduhan setelah memahami sifat dan akibat pengakuan tersebut. Perayu-perayu kemudiannya disabitkan oleh Majistret dan dijatuhkan hukuman. Majistret selanjutnya memerintahkan hasil daripada lelongan disel dan ikan dirampas sebagai hasil Kerajaan dan juga pelupusan ekshibit-ekshibit termasuk kapal. Tidak berpuas hati dengan perintah perampasan hasil daripada disel dan ikan dan pelupusan

ekshibit-ekshibit, perayu-perayu merayu ke Mahkamah Tinggi. Isu utama di Mahkamah Tinggi adalah berkaitan dengan kesahan perampasan dan perintah pelupusan oleh Majistret. Pesuruhjaya Kehakiman ('PK') memutuskan bahawa: (i) perintah perampasan oleh Majistret adalah sah kerana peralatan penangkapan ikan termasuk pukat tunda ditemui di atas kapal, seperti yang jelas dinyatakan dalam fakta kes dan diperakui oleh perayu-perayu; (ii) ketidakadilan tidak timbul daripada perintah Majistret; dan (iii) isu berkaitan kuasa Agensi Penguatkuasaan Maritim Malaysia ('APMM') untuk menyiasat dan mendakwa di bawah Akta adalah cubaan melalui pintu belakang oleh perayu-perayu untuk mencabar sabitan di bawah samaran sebagai semakan. Oleh itu, perayu-perayu merayu terhadap keputusan PK. Isu-isu yang dibangkitkan oleh perayu-perayu adalah: (i) sama ada Majistret boleh memerintahkan rampasan ekshibit-ekshibit; dan (ii) sama ada pegawai APMM mempunyai bidang kuasa dan kuasa untuk bertindak di bawah Akta.

Diputuskan (menolak rayuan)
Oleh Tengku Maimun Tuan Mat HMR menyampaikan penghakiman mahkamah:

(1) Perayu-perayu, selepas mengaku bersalah, hanya boleh merayu terhadap takat atau kesahan hukuman. Walaupun notis rayuan tidak menyatakan apa-apa tentang hukuman kerana rayuan pada asasnya adalah terhadap perintah perampasan dan pelupusan ekshibit-ekshibit, khususnya kapal. Jelas bahawa kesahan hukuman juga dicabar atas alasan bahawa pengakuan bersalah dibuat secara silap kerana pagawai-pegawai APMM yang menyiasat dan mendakwa perayu-perayu sebenarnya tiada kuasa untuk bertindak di bawah Akta tersebut.

(2) Hujahan perayu-perayu bahawa pegawai-pegawai APMM tidak berkuasa untuk bertindak di bawah Akta kerana mereka tidak termasuk dalam ss. 2 atau 36 dan tiada seorang pun pegawai APMM mengemukakan apa-apa dokumen ke mahkamah untuk menunjukkan bahawa mereka dilantik untuk tujuan itu dan bahawa pelantikan mereka diterbitkan dalam warta adalah salah tanggap. Perayu-perayu telah mengaku bersalah di Mahkamah Majistret. Oleh sebab tiada perbicaraan berkaitan dengan pertuduhan terhadap perayu-perayu, isu-isu berkaitan tidak mengemukakan apa-apa dokumen untuk membuktikan identiti atau pelantikan pegawai-pegawai tersebut tidak timbul.

(3) Walaupun Agensi Penguatkuasaan Maritim Malaysia 2004 ('Akta APMM') memperuntukkan fungsi dan kuasa APMM untuk, antara lain, menyiasat apa-apa kesalahan atau menangkap sesiapa yang ia mempunyai sebab untuk mempercayai telah melakukan kesalahan, tiada peruntukan dalam Akta APMM berkaitan kesalahan-kesalahan. 'Kesalahan' didefinisikan dalam s. 2 Akta APMM sebagai apa-apa kesalahan di bawah undang-undang persekutuan yang diguna pakai dalam Zon Maritim Malaysia. Seksyen 7(3) Akta APMM

memperuntukkan bahawa bagi tujuan Akta APMM, seseorang pegawai APMM mempunyai kesemua kuasa yang boleh dilaksanakan oleh mana-mana agensi yang berkaitan di bawah undang-undang persekutuan yang diguna pakai dalam Zon Maritim Malaysia. Agensi yang berkaitan mestilah sewajarnya termasuk Jabatan Perikanan dan undang-undang persekutuan adalah Akta Perikanan. Oleh itu, tidak diragui bahawa peruntukan Akta APMM membenarkan pegawai-pegawai APMM bertindak di bawah Akta Perikanan. Isu kedua oleh itu ditolak kerana tidak bermerit.

(4) Peruntukan relevan yang dilanggar atau tidak dipatuhi oleh perayu-perayu adalah s. 16 Akta. Terdapat peralatan menangkap ikan termasuk pukat tunda di atas kapal dan perayu-perayu mengakui bahawa mereka didapati melakukan atau mencuba melakukan aktiviti-aktiviti penangkapan ikan di perairan Malaysia. Dapatan tersebut adalah konsisten dengan nota prosiding Mahkamah Majistret. Fakta-fakta yang dikemukakan oleh pihak pendakwaan telah dibacakan dan diperjelaskan kepada perayu-perayu oleh jurubahasa Vietnam dan setiap seorang perayu mengakui fakta-fakta tersebut. Perayu-perayu juga mengakui bahawa pukat tunda ditemui dari kapal tersebut. Oleh itu, tiada asas untuk menghujahkan bahawa PK khilaf dalam dapatannya.

(5) Pada asalnya, pertuduhan yang dikenakan terhadap perayu-perayu adalah di bawah s. 15(1)(a) Akta. Walau bagaimanapun, pertuduhan tersebut dikurangkan kepada pertuduhan di bawah s. 16(3) Akta, terhadap mana perayu-perayu mengaku bersalah. Oleh itu, tiada merit dalam hujahan perayu-perayu bahawa mereka sepatutnya dipertuduh di bawah s. 15(1)(a).

(6) Perintah perampasan hasil jualan disel dan ikan dan perintah pelupusan kapal adalah sah di bawah s. 34 Akta. Walaupun Majistret menggunakan perkataan 'pelupusan' dan bukan 'perampasan' berkaitan dengan ekshibit-ekshibit, bagi setiap niat dan tujuan, kesannya adalah sama, iaitu, kesemua ekshibit dirampas untuk dilupuskan oleh pihak pendakwaan. Tiada ketidakadilan substansial yang berlaku dengan perintah Majistret.

(7) Selanjutnya, sesuatu perintah perampasan atau pelupusan boleh dibuat oleh mahkamah di bawah s. 34 walaupun Timbalan Pendakwa Raya tidak membuat permohonan bagi perampasan atau pelupusan kapal tersebut. Faktor penentu adalah sama ada mahkamah berpuas hati bahawa kapal tersebut adalah subjek atau digunakan dalam melakukan sesuatu kesalahan. Tidak diragui bahawa, walaupun pertuduhan bukan di bawah peruntukan yang dinyatakan dalam s. 52, kapal tersebut digunakan dalam melakukan kesalahan tersebut, iaitu, memasuki perairan Malaysia tanpa memberitahu pihak berkuasa Malaysia bertentangan dengan s. 16(3) Akta. Oleh itu, mahkamah mempunyai kuasa untuk memerintahkan perampasan kapal tersebut. Dengan itu,

tiada kekhilafan oleh PK dalam mengesahkan perintah yang dibuat oleh Majistret berkaitan dengan kapal tersebut. Hasil jualan disel dan ikan dan kapal penangkapan ikan diperintahkan dilucuthakkan kepada Kerajaan Malaysia dan dilupuskan menurut undang-undang.

Case(s) referred to:
Chor Phaik Har v. Farlim Properties Sdn Bhd [1994] 4 CLJ 285 FC ***(refd)***
Yong Kar Mun v. PP [2013] 5 CLJ 751 CA ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 305, 325
Fisheries Act 1985, ss. 2, 15(1)(a), 16(3), 25(a), 34, 36, 46, 47, 47A, 47B, 47C, 47D, 52(1)(a)(i), 54
Malaysian Maritime Enforcement Agency Act 2004, ss. 3(2), 6(1)(a), (2), 7(2), (3), 8
Merchant Shipping Ordinance 1952, s. 2
Penal Code, s. 34

For the appellants - CM Sundram; M/s CM Sundram & Co
For the respondent - Wan Shaharuddin Wan Ladin; DPP

[Editor's note: For the High Court judgment, please see Tan Van Chieu & Ors v. Agensi Penguatkuasaan Maritim Malaysia [2015] 1 LNS 883 (affirmed).]

Reported by S Barathi

JUDGMENT

Tengku Maimun Tuan Mat JCA:

[1] The appellants were convicted in the Magistrate's Court for the following offence:

Pertuduhan

Bahawa kamu Tan Van Chieu bersama-sama 17 orang yang lain (seperti di lampiran A halaman 2) pada 23 April 2015 jam lebih kurang 0710H di atas vessel penangkapan ikan asing bernombor pada badan vessel KG93898TS di kedudukan Garis Lintang 030 42.929' Utara dan Garis Bujur 1100 26.857' Timur di perairan perikanan Malaysia pada jarak lebih kurang 76 batu nautika dari utara Tanjung Sirik, Sarawak telah memasuki perairan perikanan Malaysia bagi maksud laluan menerusi perairan itu dalam masa pelayaran ke destinasi di luar perairan itu tanpa memberitahu seorang pegawai berkuasa melalui radio, teleks atau faksimili dalam Bahasa Inggeris atau Melayu tentang nama, Negara bendera, lokasi, jalan dan destinasi vessel itu, jenis dan amaun ikan yang dibawa dan tentang hal keadaan memasuki perairan perikanan Malaysia di bawah seksyen 16(3) Akta Perikanan 1985. Oleh itu kamu telah bersama-sama melakukan satu kesalahan di bawah seksyen 16(3) Akta Perikanan 1985 yang dibaca bersama seksyen 34 Kanun Keseksaan dan boleh dihukum di bawah seksyen 25(a) Akta yang sama (Akta 317).

A Hukuman

Seksyen 25(a) denda tidak melebihi Ringgit Malaysia Satu Juta (RM1,000,000.00) setiap orang dalam hal empunya atau nakhoda dan Ringgit Malaysia Satu Ratus Ribu (RM100,000.00) dalam hal tiap-tiap anggota kru.

B **[2]** The appellants had pleaded guilty to the charge, having understood the nature and consequences of the plea, after the charge was read and explained by the Vietnamese interpreter.

[3] The prosecution then tendered the facts of the case (exh. P1), and the relevant parts read:

C

1. … Agensi Penguatkuasaan Maritim Malaysia (APMM) telah membuat pemeriksaan dan tangkapan ke atas sebuah vesel penangkapan ikan asing iaitu Ha Xuan 97 KG938998TS ... yang didapati sedang memasuki perairan perikanan Malaysia di kedudukan Garis Lintang 030 42.929 Utara Garis Bujur 1100 26.857 timur pada jarak kira-kira 76 batu nautika dari Tanjung Sirik.

D

2. Pemeriksaan mendapati nakhoda dan 18 awak-awak vesel tersebut adalah warga Vietnam bernama:

   ...

E ...

   ...

3. Vesel tersebut cuba menangkap ikan menggunakan pukat tunda di perairan Perikanan Malaysia dan juga telah gagal mengemukakan apa-apa pemberitahuan atau kebenaran daripada mana-mana

F pegawai berkuasa, maka vesel tersebut berserta peralatan menangkap ikan dan navigasi serta kru vesel warganegara asing seramai 19 orang telah ditahan dan satu laporan polis telah dibuat oleh pengadu ...

4. Siasatan mendapati vesel tersebut merupakan vesel penangkapan

G ikan asing cuba menangkap ikan di Perairan Perikanan Malaysia dan tiada dokumen pendaftaran kapal menunjukkan bahawa vesel tersebut berdaftar di Sarawak di atas vesel.

5. ...

6. Pakar pukat daripada Jabatan Perikanan Malaysia membuat

H pemeriksaan ke atas vesel tersebut dan mengesahkan bahawa vesel tersebut merupakan sebuah vesel penangkapan ikan yang dilengkapi dengan peralatan penangkapan ikan iaitu pukat tunda yang lengkap. Ketika ditahan, didapati lebih kurang 1000 kilo gram ikan campur hasil tangkapan ikan di atas vesel tersebut, manakala hanya lebih kurang 6000 liter diesel di dalam tangki simpanan vesel tersebut.

I

7. ...

8. ...

9. ...

10. ...

11. ...

12. Oleh itu, memandangkan hasil siasatan telah membuktikan dengan jelas bahawa vesel KG93898TS telah memasuki Perairan Malaysia dan kegagalan nakhoda vesel KG93898TS memberitahu seseorang pegawai berkuasa melalui radio, teleks atau faksimili dalam Bahasa Inggeris atau Melayu tentang nama, Negara bendera, lokasi, jalan dan destinasi vesel itu, jenis dan amaun ikan yang dibawanya dan tentang hal keadaannya ia memasuki Perairan Perikanan Malaysia. Tekong ... dan awak-awak ... telah melakukan satu kesalahan di bawah seksyen 16(3) Akta Perikanan 1985 dibaca bersama seksyen 34 Kanun Keseksaan dan boleh dihukum di bawah seksyen 25(a) Akta Perikanan 1985 (Akta 317).

[4] The appellants, who were represented by defence counsel, were accordingly convicted by the Magistrate and the following sentence was thereby passed:

(i) the first appellant being the master of the vessel was fined RM50,000 in default four months' imprisonment; and

(ii) the second to the seventeenth, being the crew were each fined RM20,000 in default two months' imprisonment.

A further order was made that:

> The proceed from the auction of the diesel and fishes sum of RM5500.00 and RM1300.00 hereby to be forfeited as government revenue and exhibit P17-P28 to be disposed off by the prosecutions after lapse of 14 days appeal period.

[5] Dissatisfied with the order of the Magistrate's Court for the forfeiture of the proceeds of the diesel and fish and the disposal of the exhibits (which includes the vessel), the appellants filed an appeal to the High Court. The prosecution filed a cross-appeal against inadequacy of sentence, but the cross-appeal was later withdrawn against all the appellants.

Proceedings In The High Court

[6] Apart from filing the notice of appeal, the appellants had also sought for the exercise of the High Court's inherent power of revision under s. 325 of the Criminal Procedure Code (CPC).

[7] The core issue before the High Court concerned the validity of the forfeiture and disposal order made by the learned Magistrate.

[8] It was submitted by learned counsel that since there had been no order of forfeiture of the vessel by the learned Magistrate and since there is no provision under s. 25(a) of the Fisheries Act 1985 (the Fisheries Act) to order that the vessel (including its equipment, furniture, appurtenances, stores, cargo and fishing appliance) be disposed by the prosecution, the same should be returned to the rightful owner together with the proceeds of the sale of the diesel.

[9] The learned Judicial Commissioner was of the view that the forfeiture of the proceeds of sale of the diesel and fish and the disposal of the exhibits are valid under s. 34 of the Fisheries Act. This is because the fishing paraphernalia including a trawl net was found on board the vessel, as clearly stated in the facts of the case and admitted by all the appellants that they were found to engage or attempt to engage in fishing activities in Malaysian waters.

[10] It was thus held by the learned Judicial Commissioner that the order for the forfeiture made by the learned Magistrate was valid under the law as the order, for all intent and purpose, fell within the meaning of s. 34 of the Fisheries Act.

[11] In considering the court's power of revision, the learned Judicial Commissioner considered the question whether substantial justice has been done or will be done and whether the order made by the learned Magistrate should be interfered in the interest of justice. The learned Judicial Commissioner concluded that no miscarriage of justice had arisen from the learned Magistrate's order.

[12] The appellants had also challenged the power of the Malaysian Maritime Enforcement Agency (the MMEA) officers to investigate and prosecute under the Fisheries Act. His Lordship ruled that the issue on the power of MMEA officers was a backdoor attempt by the appellants to challenge the conviction under the disguise of revision.

[13] For the above reasons, the learned Judicial Commissioner dismissed the appeal. Aggrieved, the appellants appealed to this court.

The Appeal

[14] Before us, learned counsel for the appellants canvassed the following issues:

(i) whether the learned Magistrate could order the forfeiture of the exhibits; and

(ii) whether the MMEA officers have the jurisdiction and powers to act under the Fisheries Act.

[15] In respect of the first issue, the bone of contention of learned counsel was that there is no provision under s. 25(a) of the Fisheries Act for the learned Magistrate to order that the proceeds of the diesel and fish be forfeited and that the vessel be disposed of by the prosecution. The appellants thus contended that in affirming the order of the Magistrate, the learned Judicial Commissioner had erred in law.

[16] According to learned counsel, the situation was further aggravated by the issuance of a letter from the Assistant Registrar of the subordinate courts dated 3 July 2015, which was a reply to a request by the appellants for the vessel to be returned to the rightful owner.

[17] In the said letter, after reiterating the order of the learned Magistrate to dispose the exhibits by the prosecution after the lapse of the appeal period, it granted the prosecution an option whether to dispose the same by way of 'returning to the rightful owner' or other method of disposal. Such an option as to the mode of disposal, contended learned counsel, is also not provided for under the Fisheries Act.

[18] In the premises the appellants contended that there has been no order of forfeiture of the vessel by the learned Magistrate and since there is no provision under s. 25(a) of the Act to order that the vessel (including its equipment, furniture, appurtenances, stores, cargo and fishing appliances) to be disposed by the prosecution, the same should be returned to the rightful owner together with the proceeds of the sale of the diesel.

[19] In respect of the second ground of appeal, it was the contention of learned counsel that the learned Judicial Commissioner had erred in law when it stated that the appellants were seeking a back door entry when the appellants challenged the powers of the MMEA officers in utilising the Fisheries Act in their endeavour to act against the appellants. Learned counsel contended that the appellants had pleaded guilty erroneously because there is no power for the MMEA to act under ss. 46, 47, and 47A-D of the Fisheries Act when they detained the appellants and conducted investigation. (the said sections pertain to powers of authorised officer; powers of entry, seizure and arrest etc; powers of investigation and attendance and examination of witnesses and procedure where investigation cannot be completed within 24 hours by a fisheries officer, respectively).

[20] In this case, the MMEA had enforced such action and had conducted investigation against the appellants using the Fisheries Act which clearly stipulates that the MMEA officers are not "authorised officers" in accordance with s. 2 of the Fisheries Act and the respondent had not submitted any proof to the courts below that they had been appointed as such authorised officers by the Honourable Minister through a publication in the *Gazette* in accordance with s. 36 of the Fisheries Act.

[21] The appellants contended that the action of the MMEA's officers should have been in accordance with what has been provided for them under ss. 6, 7 and 8 of the Malaysian Maritime Enforcement Agency Act 2004 (the MMEA Act). This is because the provisions under ss. 3(2) and 6(2) of the MMEA Act clearly state that the agency's action when deployed to perform their functions, shall be "subject to this Act".

[22] Given this caveat, learned counsel submitted that the MMEA must use the provisions stated above to carry out their mode of enforcement in order to take action against anyone who commits any offence stipulated in any federal law within the Malaysian Maritime Zone.

[23] That being the case, the entire action to use the Fisheries Act against the appellants must fail for want of application of the right law and for that reason, the appellants argued that although they have pleaded guilty, it was so pleaded under a mistaken view of the law and therefore, the plea of guilty ought to be set aside and the case be remitted to the Magistrate's Court for retrial.

[24] For the respondent, learned DPP submitted that based on s. 305 of the Criminal Procedure Code, the appeal upon a plea of guilt is limited only to the extent or the legality of the sentence. Since the accused had pleaded guilty and there was no notice of motion filed to review the conviction, the issue of the powers of MMEA would no longer be relevant and the order granted by the learned Magistrate had become academic. Further, the second to the 17th appellants had served their respective sentence and for the court to order a retrial in the circumstances would also become academic.

[25] Learned DPP further submitted that in any event, based on the provisions of the MMEA Act, the MMEA officers had the powers to enforce all federal laws and the Fisheries Act is one such law. The learned Judicial Commissioner was therefore correct in his decision to affirm the order of the learned Magistrate.

Our Decision

[26] First and foremost, as clearly stipulated in s. 305 of the CPC, the appellants having pleaded guilty, could only appeal against the extent or legality of the sentence. Although the notice of appeal made no mention of the sentence as the appeal essentially is against the order of forfeiture and disposal of the exhibits, in particular the vessel, in the course of submissions, it appears that the legality of the sentence is also being challenged on the ground that the guilty plea was made under a mistaken view as the MMEA officers who investigated and prosecuted the appellants in fact had no power to act under the Fisheries Act.

Whether The MMEA Officers Has The Jurisdiction And Powers To Act Under The Fisheries Act

[27] For convenience, we reproduce below the relevant provisions of the MMEA Act and the Fisheries Act. To begin with, s. 3 of the MMEA Act provides:

> Establishment of the Malaysian Maritime Enforcement Agency
>
> 3. (1) For the purpose of this Act, the Malaysian Maritime Enforcement Agency is established.
>
> (2) The Agency shall, subject to this Act, be employed in the Malaysian Maritime Zone for the maintenance of law and order, the preservation of the peace, safety and security, the prevention and detection of crime, the apprehension and prosecution of offenders and the collection of security intelligence.

[28] Section 6(1)(a) of the MMEA Act provides for the functions of the MMEA one of which is to enforce law and order under any federal law. And s. 7 of the MMEA Act reads:

Powers of the Agency

7. (1) The Agency shall have powers to carry out the purposes mentioned in subsection 3(2) and to do all things reasonably necessary for or incidental to the performance of its functions under section 6.

(2) In particular, but without prejudice to the generality of subsection (1), the Agency shall have power:

(a) to receive and consider any report of the commission of an offence;

(b) to stop, enter, board, inspect and search any place, structure, vessel or aircraft and to detain any vessel or aircraft;

(c) to demand the production of any licence, permit, record, certificate or any other document and to inspect such licence, permit, record, certificate or other document or make copies of or take extracts from such licence, permit, record, certificate or other document;

(d) to investigate any offence which it has reason to believe is being committed, or is about to be committed or has been committed;

(e) to exercise the right of hot pursuit;

(f) to examine and seize any fish, article, device, goods, vessel, aircraft or any other item relating to any offence which has been committed or it has reason to believe has been committed;

(g) to dispose of any fish, article, device, goods, vessel, aircraft or any other item relating to any offence which has been committed or it has reason to believe has been committed;

(h) to arrest any person whom it has reason to believe has committed an offence; and

(i) to expel any vessel which it has reason to believe to be detrimental to the interest of or to endanger the order and safety in the Malaysian Maritime Zone.

(3) Without prejudice to the generality of subsection (1), an officer of the Agency shall have, for the purpose of this Act, all the powers which any relevant agency may exercise under any federal law which is applicable in the Malaysian Maritime Zone.

[29] We move on to the relevant provisions in the Fisheries Act. Section 2 defines "authorised officer" as the Director-General, a Deputy Director-General of Fisheries, a fisheries officer, a port officer as defined in s. 2 of the Merchant Shipping Ordinance 1952 (Ord 70 of 1952), the commanding officer of any Government naval vessel or Government aircraft, the

commanding officer of any Government marine police vessel or any other person or class of persons appointed to be an authorised officer or authorised officers under s. 36.

[30] Section 36 states:

> Without prejudice to the definition of "authorised officer" in section 2, the Minister may, by order in the *Gazette*, appoint such other person or class of persons as he may consider necessary to be an authorised officer or authorised officers for the purposes of this Act.".

[31] While s. 54 of the Fisheries Act reads:

> Authorised officer to declare office
>
> 54. Any authorised officer when discharging his functions or duties or exercising his powers under this Act shall, on demand, produce to any person against whom he is taking action, such identification or written authority to show that he is an authorised officer for the purposes of this Act.

[32] Relying on ss. 2, 36 and 54 quoted above, learned counsel contended that the MMEA officers had no power to act under the Fisheries Act as the MMEA officers are neither included under s. 2 nor s. 36 and that none of the MMEA officers have tendered any document to the court to show that they have been appointed as such and that their appointments had been published in the *Gazette*. Further, the MMEA officers have never been able to produce such a document in all the courts below to show that they carry the document in accordance with s. 54 of the Fisheries Act.

[33] We do not lose sight of the fact that the appellants had pleaded guilty in the Magistrate's Court. Given that there was no trial in respect of the charge against the appellant, the issue of not producing or tendering any document to prove the identification or appointment of the officers does not arise. The submission of learned counsel in this regard is, with respect, misconceived.

[34] Learned counsel had also emphasised that the MMEA officers must implement the provisions of the MMEA Act under any federal law within the Malaysian Maritime Zone and that anyone who infringes and commits an offence under such federal law may be subject to the wrath of the MMEA but the MMEA's action must be in accordance with the MMEA Act. Although what the MMEA officers are presently doing is that they are taking action against persons who commit offences under any federal law within the Malaysian Maritime Zone, instead of using their own MMEA Act, they are using the Fisheries Act, which according to learned counsel, is erroneous.

[35] With respect, we find no merit in the submission of learned counsel. While the MMEA Act provides for functions and powers of the MMEA to, *inter alia*, investigate any offence or arrest any person whom it has reason to believe has committed an offence, there is no provision in the MMEA Act

itself in respect of offences. "Offence" has been defined in s. 2 of the MMEA Act as any offence under any federal law which is applicable in the Malaysian Maritime Zone. In the light of such definition of "offence" we are of the view that it follows that whatever action to be taken by the MMEA in respect of the offence must fall back on the federal law prescribing such an offence.

[36] It is clear that the establishment of the agency was to provide for one lead agency to enforce the federal law in the Malaysian Maritime Zone. The MMEA Act is designed to do just that and whatever action taken by the MMEA officers in their role to establish law and order within the Malaysian Maritime Zone, they must subject themselves to the provisions of the MMEA Act. Sub-section 7(2) of the MMEA Act provides for the power of the MMEA to arrest, detain and investigate. In particular s. 7(2)(d) states that the MMEA has the power to investigate any offence which it has reason to believe is being committed, or is about to be committed or has been committed. Section 7(3) provides that for the purpose of the MMEA Act, an officer of the MMEA shall have all the powers which any relevant agency may exercise under any federal law which is applicable in the Malaysian Maritime Zone. The relevant agency must necessarily include the Fisheries Department and the federal law, the Fisheries Act.

[37] The intention of the Legislature in enacting the MMEA Act can be seen from the Hansard, an aid of interpretation (see *Chor Phaik Har v. Farlim Properties Sdn Bhd* [1994] 4 CLJ 285; [1994] 3 MLJ 345; *Yong Kar Mun v. PP* [2013] 5 CLJ 751). In tabling the MMEA Bill at the sitting of the Dewan Rakyat (House of Representatives) on 14 June 2004, the Minister in the Prime Minister's Department said at p. 62 of the Hansard:

> APMM merupakan agensi utama yang akan melaksanakan penguatkuasaan, oleh yang demikian tidaklah berlaku tolak menolak kepada agensi lain.

[38] And in the sitting of the Dewan Negara (Senate) on 16 June 2004, the Minister said at p. 63:

> Pengisytiharan ZEE (Zon Ekonomi Ekslusif) telah memperluaskan tugas agensi yang dipertanggungjawabkan mengawal dan mengurus hal-hal maritim. Penguatkuasaan undang-undang maritim negara masa ini diuruskan secara sectoral oleh 11 jabatan ataupun agensi kerajaan. Ianya melibatkan hampir 5,000 anggota dan lebih 400 buah kapal dan bot.
>
> Dalam hubungan ini agensi-agensi yang berkaitan telah mengambil langkah-langkah bersendirian untuk mengembangkan organisasi dan menambahkan aset agensi masing-masing sejajar dengan tanggungjawab yang diberikan. Meskipun pendekatan ini dalam konteks jabatan masing-masing ada keberkesanannya, namun dalam konteks negara dan begitu banyaknya agensi yang terlibat dalam aspek penguatkuasaan, ianya telah menyebabkan pertindihan fungsi dan bidang kuasa, pertindihan kawasan

A operasi serta persaingan perolehan aset. Pengurusan secara ini bukanlah merupakan pengurusan maritim yang efisien dan penggunaan aset yang optimum.

... bahawa masanya sudah tiba untuk negara kita mengubahkan pendekatan penguatkuasaan maritim secara sectoral kepada cara
B penguatkuasan melalui satu agensi yang singular dan dedicated bagi menguatkuasakan segala undang-undang Persekutuan di laut.

[39] In the light of the above, we dismiss the second issue as it is devoid of any merit, as we entertain no doubt that the provisions of the MMEA Act allow the MMEA officers to act under the Fisheries Act.

C *Whether The Magistrate Could Order The Forfeiture Of The Proceeds And The Disposal Of The Vessel*

[40] Learned counsel contended that since there was no order of forfeiture of the vessel by the learned Magistrate and since there is no provision in
D s. 25(a) of the Fisheries Act to order that the vessel (including its equipment, furniture, appurtenances, stores, cargo and fishing appliance) be disposed by the prosecution, the same should be returned to the rightful owner together with the proceeds of the sale of the diesel.

[41] For convenience, we set out s. 25 of the Fisheries Act which reads:

E Offences under Act

25. Any person who contravenes or fails to comply with any provision of this Act shall be guilty of an offence and where no special penalty is provided in relation thereto, such person shall be liable:

F (a) where the vessel concerned is a foreign fishing vessel or the person concerned is a foreign national, to a fine not exceeding one million ringgit each in the case of the owner or master, and one hundred thousand ringgit in the case of every member of the crew;

(b) in all other cases, to a fine not exceeding twenty thousand ringgit or a term of imprisonment not exceeding two years or both.

G **[42]** The relevant provision which the appellants had contravened or failed to comply is s. 16 of the Fisheries Act which provides:

Passage of foreign fishing vessel through Malaysia fisheries waters

16.(1) Subject to subsections (2) and (3) a foreign fishing vessel may enter
H Malaysian fisheries waters, for the purpose of passage through such waters in the course of a voyage to a destination outside such waters.

(2) Such passage, which shall be exercised in accordance with rules of international law of the sea relating to the relevant maritime regime
I applicable to such Malaysian fisheries waters, includes stopping and anchoring only:

(a) if the vessel is in distress;

(b) for the purpose of obtaining emergency medical assistance for a member of its crew; or

(c) to render assistance to persons, ships or aircraft in danger or distress.

(3) The master of a foreign fishing vessel entering Malaysian fisheries waters for the purpose mentioned in subsection (1) shall notify by radio, telex or facsimile in the English or Malay Language an authorised officer of the name, the flag State, location, route and destination of the vessel, the types and amount of fish it is carrying and of the circumstances under which it is entering Malaysian fisheries waters.

[43] Learned counsel had submitted that the Judicial Commissioner erred in concluding that s. 34 of the Fisheries Act is applicable on the premise that the appellants had admitted the facts of the case that they were found to engage or attempt to engage in fishing activities in Malaysian waters.

[44] We have perused the appeal record and we agree with the finding of the learned Judicial Commissioner that on board, there was the fishing paraphernalia including a trawl net and that the appellants had admitted that they were found to engage or attempt to engage in fishing activities in Malaysian waters. The finding is consistent with the notes of proceedings in the Magistrate's Court as can be seen at pp. 11-12, p. 48 of the record of appeal vol. 2/2.

[45] At p. 48 of the appeal record vol. 2/2, the facts tendered by the prosecution states "... didapati tertuduh sebagai nakhoda dan awak-awak vesel Ha Xuan 97 KG 93898T yang memasuki perairan Perikanan Malaysia didapati telah menjalankan aktiviti menangkap ikan menggunakan pukat tunda". These facts were read and explained to the appellants by the Vietnamese interpreter. Each of the appellants admitted to the facts (see pp. 11-12 appeal record vol. 2/2). Hence, there was no basis to contend that the learned Judicial Commissioner erred in his finding as submitted by learned counsel for the appellants. As for the trawl net, it has been produced in the Magistrate's Court and the appellants had similarly admitted that the trawl nets (exhs. P25(a) and (b) were recovered from the vessel (see pp. 26-27 appeal record vol. 2/2).

[46] Learned counsel had further submitted that if the appellants had indeed been fishing or even attempted to do so within Malaysian waters, the prosecution would have opted to charge them under s. 15(1)(a) of the Fisheries Act for which there are provisions under s. 52 (1)(a)(i) to forfeit not only the vessel but also its appurtenances and its catch as well.

[47] Indeed, the record of appeal shows that when the case came up before the Magistrate's Court on 21 May 2015, the charge proffered against the appellants was under s. 15(1)(a) of the Fisheries Act (see sanction to

prosecute at pp. 37-38 and the charge at p. B3 of appeal record vol 2/2). The appellants pleaded not guilty to the charge and learned DPP requested that the court fix trial dates.

[48] Learned counsel, (who is the same counsel appearing before us) then addressed the Magistrate as follows:

> We have simple application to make before this court which is upon the receipt of the documents under section 51A CPC we have actually contemplated of making a representation to the learned DPP for the charge to be reduced and the (*sic*) for reason perhaps court could consider fixing the 16th of June 2015 as a date for further mention of this matter by which we ought to get a response from the learned DPP whether or not they are going to consider our representation. This effort will save this honourable court valuable time taking into account the whole process will be involving a lot of expenses particularly transporting the Vietnamese interpreter as well as maintain the suspect. Hope can consider the representation.

[49] The appeal record revealed that the learned Magistrate fixed 22 June 2015 for pre-trial case management and on even date, the learned DPP informed the court that:

> we had agreed to reduce the charge under section 16(3) of the Fisheries Act, pray that the charge be read and explained to all the accused person.

[50] The charge was then read and explained to the appellants and as mentioned earlier, the appellants had all pleaded guilty. In the circumstances, we fail to see the merit in learned counsel's argument that the prosecution ought to have charged the appellants under s. 15(1)(a), when it was upon learned counsel's representation that the charge was reduced to one under s. 16(3).

[51] The gist of learned counsel's submission on the forfeiture and disposal order of the Magistrate was that there is no provision in s. 25(a) of the Fisheries Act for the exhibits (which includes the vessel) to be disposed or forfeited.

[52] While s. 25(a) of the Fisheries Act has no such provision, we concur with the learned Judicial Commissioner that the order for the forfeiture of the proceeds of sale of the diesel and fish and the order for the disposal of the vessel are valid under s. 34 of the Fisheries Act. We also concur with the learned Judicial Commissioner that although the learned Magistrate used the word "disposed" and not "forfeited" in respect of the exhibits, for all intents and purposes, the effect is the same, namely that the exhibits are forfeited to be disposed of by the prosecution. When the court ordered for forfeiture, the step to be taken by the prosecution would be to have the exhibits including the vessel disposed of in a manner deemed fit and proper by the law. No substantial injustice had been occasioned by the order of the learned Magistrate.

[53] As for s. 34 of the Fisheries Act which was relied upon by the learned Judicial Commissioner, it reads:

> Court may order forfeiture of seized vessel etc., in certain circumstances
>
> 34. Where it is proved to the satisfaction of a court that any vessel, vehicle, article or thing seized under this Act was the subject-matter of, or was used in the commission of, an offence under this Act, the court may order the forfeiture of such vessel, vehicle, article or thing notwithstanding that no person may have been found guilty of such offence.

[54] Learned counsel submitted that the instant case does not fall "in certain circumstances" stated in s. 34, to warrant the forfeiture of the vessel. The "certain circumstances", according to learned counsel, would be a situation where the police or customs chase a vehicle and when they arrive, they find contraband in it but no one is around. The vehicle is seized and later, upon the order of the court, it is forfeited and then, it is ordered to be disposed in accordance with law. That situation may warrant "certain circumstances" where none is charged but because of the circumstances it was found, the vehicle may be forfeited. In the present case however, the vessel was not used in the commission of the offence which entails it to be forfeited because, the appellants had only entered Malaysian waters without informing any authorised person of such entry.

[55] In our judgment, whether there should be an order for the vessel to be disposed of or forfeited or otherwise under s. 34 of the Fisheries Act, the determining factor is whether the court is satisfied that the vessel was either the subject-matter or was used in the commission of an offence. It is further our judgment that an order for forfeiture or disposal may be made by the court under s. 34 notwithstanding that the DPP has made no application for the forfeiture or disposal of the vessel.

[56] We take note that under s. 52 of the Fisheries Act, by the use of the word "shall", it is mandatory for the court to order the forfeiture of the vessel where certain offences had been committed. Section 52 states:

> Forfeiture and disposal of vessel, etc.
>
> 52.(1) Where any person is found guilty of any offence:
>
> (a) under paragraph 8(a), subsections 11(3), 15(1) or section 26; and
>
> (b) for the contravention of any condition of licence relating to permitted fishing areas under the licence,
>
> the court shall, in addition to any other penalty that may be imposed:
>
> (i) order that the vessel (including its equipment, furniture, appurtenances, stores, cargo and fishing appliance), vehicle, article or thing used in the commission of such offence or in relation to which such offence has been committed be forfeited; and

A (ii) order that any fish caught in the commission of such offence or proceeds of the sale of any fish or other article or a perishable nature referred to in section 48, and any explosive, poison, pollutant, apparatus or prohibited gear used or intended to be used in the commission of such offence be forfeited.

B (2) Any vessel (including its equipment, furniture, appurtenances, stores, cargo and fishing appliance), vehicle, article, thing, explosive, poison, pollutant, apparatus, prohibited gear or fish ordered to be forfeited under subsection (1) or deemed or ordered to be forfeited under section 49 shall be disposed of in such manner as the Director General may think fit and consistent with any scheme for
C the limitation of fishing effort.

[57] There is no doubt that in the present case, although the charge was not under the provisions stated in s. 52 above, the fishing vessel was used in the commission of the offence *to wit*, entering Malaysian waters without informing the Malaysian authorities in contravention of s. 16(3) of the
D Fisheries Act. In our view, the court therefore has the power to order the forfeiture of the vessel. We thus find no error on the part of the learned Judicial Commissioner in affirming the order made by the learned Magistrate in respect of the said vessel.

[58] To conclude, we find no merits in the appeal. The appeal is
E unanimously dismissed. The order of the learned Magistrate which was upheld by the High Court is affirmed. In order to dispel any doubt, we order that the impugned items namely the proceeds of the sale of diesel and fish and the fishing vessel be forfeited to the Government of Malaysia and that they be disposed of according to law.

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